JD(SF)–13–05
Sacramento, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

FIRST RESPONDER EMS-SACRAMENTO, INC.,[1]
Employer

and 20-RC-17970

NATIONAL EMERGENCY MEDICAL SERVICES ASSOCIATION (NEMSA)
Petitioner

and

HEALTH CARE WORKERS' UNION LOCAL 250, SEIU, AFL-CIO
Intervenor

Todd C. Amidon, Esq., (Seyfarth Shaw, LLP),
San Francisco, California for the Employer.

Timothy K. Talbot, Esq. (Carroll, Burdick & McDonough, LLP)
Sacramento, California, for the Petitioner.

ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS AND OBJECTIONS

On November 2, 2004,[2] the Regional Director for Region 20 issued a Report on Objections and Challenged Ballots and Notice of Hearing in the above-captioned matter and finding that the challenged ballots and objections raised substantial and material issues of fact that could best be resolved by a hearing, ordered that a hearing be conducted before an administrative law judge.

[1] At the hearing there was no objection to the Employer's motion to amend the case caption to reflect its correct name.

[2] All dates herein refer to 2004 unless otherwise stated.

The hearing was held on December 2 in Sacramento, California. The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses and to introduce relevant evidence.[3] Since the close of hearing, briefs have been received from the Employer, the Petitioner (NEMSA) and Intervenor. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

1. Procedural History

Pursuant to a Stipulated Election Agreement that the Acting Regional Director approved on August 12, an election by secret ballot was conducted by the Regional Director of Region 20 (Region) of the National Labor Relations Board (Board) on August 26 in the following appropriate collective-bargaining units:

> **Group A**: All full-time and regular part-time and per diem * Specialty Care Transportation Nurses employed by the Employer at its facilities located at 7125 Fair Oaks Blvd., Carmichael; 7501 Sunrise Blvd., Citrus Heights; 3000 T Street and 8611 Folsom Boulevard, Sacramento, California; excluding non-professional employees, guards and supervisors as defined in the Act.
>
> **Group B**: All full-time and regular part-time and per diem * paramedics, EMT-1s, Dispatchers and Medi-Van drivers employed by the Employer at its facilities located at 7125 Fair Oaks Blvd., Carmichael; 7501 Sunrise Blvd., Citrus Heights; 3000 T Street and 8611 Folsom Boulevard, Sacramento, California; excluding professional employees, guards and supervisors as defined in the Act.
>
> - per diem employees who worked an average of four hours a week during the previous calendar quarter from April 1, 2004 to June 30, 2004 are eligible to vote.

The payroll period for eligibility ended July 31. Voting Group A voted for inclusion with Voting Group B as a single unit for purposes of collective bargaining.

The Region served the Tally of Ballots upon the parties at the conclusion of the election which shows:

Group A

Approximate number of eligible voters	6
Number of void ballots	0
Number of votes cast for inclusion with non-professional employees	5
Number of votes cast against inclusion with non-professional employees	0
Number of valid votes counted	5

[3] Despite having been served with the Report on Objections and Challenged Ballots and Notice of Hearing, the Intervenor failed to appear at the hearing. On December 1, Intervenor filed a request for postponement of the hearing in this case so Intervenor's witnesses could participate in a strike at an unrelated Employer. Board exhibit 1(n). That same date, the Assistant to the Regional Director denied Intervenor's request to postpone the hearing. Board exhibit 1(p).

Number of challenged ballots 0
Valid votes counted plus challenged ballots 5

Groups A & B

Approximate number of eligible voters 69
Number of void ballots 0
Number of votes cast for Petitioner 27
Number of votes cast for Intervenor 1
Number of votes cast against participating labor organizations. 28
Number of valid votes counted 56
Number of challenged ballots 8
Valid votes counted plus challenged ballots 64

The challenged ballots were sufficient in number to affect the results of the election.

On September 2 the Employer, Petitioner, and Intervenor each filed timely Objections to the Election, a copy of which was served on each of the other parties.

2. The Challenged Ballots

In the Report on Objections and Challenged Ballots and Notice of Hearing it was found that the Board challenged the ballots of Josh Hamilton, Joaquin Hernandez, Marcel Johnson, Mark Kimble, Scot Nordstrom, and Crystal Nudo on the ground that their names did not appear on either of the voter eligibility lists. Petitioner challenged the ballots of Ryan Forst and John Montalbano on the ground that they are supervisors.

At the hearing, Petitioner withdrew the challenge to the ballot of Ryan Forst. The parties further stipulated to the following facts. Each of the employees whose ballots were challenged by the Board were employed by the Employer as full-time, regular part-time or per-diem unit employees who worked an average of four hours a week during the previous calendar quarter from April 1, 2004 to June 30, 2004. The parties stipulated further that each employee was employed as of the date of the election and had been employed by the Employer during the payroll period ending July 31. Based upon the stipulated facts, I find that Josh Hamilton, Joaquin Hernandez, Marcel Johnson, Mark Kimble, Scot Nordstrom, and Crystal Nudo are eligible to vote and that their ballots should be opened and counted.

This leaves the remaining challenged ballot of John Montalbano (Montalbano). Petitioner claims Montalbano is a supervisor within the meaning of the Act. The Employer denies that Montalbano is a statutory supervisor.

From January to about October Montalbano held the position of Training Division Supervisor. At the same time he worked as a paramedic. As Training Division Supervisor, Montalbano ran the Employer's Field Training Officer Program (FTO) as well as training and orientation of new employees. Montalbano was also involved in the evaluation of applicants for employment.

Montalbano ran monthly FTO meetings where training subjects, training schedules and training assignments were discussed. Employees asked Montalbano to interpret or clarify company policy during these meetings and Montalbano assigned trainees to Field Training Officer (FTOs) employees. Montalbano reviewed written evaluations from FTOs concerning the performance of trainees as well as written evaluations of the FTOs by the trainees. Based on

those evaluations, Montalbano made recommendations to Kevin Grant, the Employer's General Manager, about which trainees and FTOs to retain.[4]

Montalbano also participated in the interviews of job applicants. Montalbano asked applicants questions from a written sheet of questions. After the interview both Grant and Montalbano each would write yes or no on the interview sheet, indicating if they would hire the applicant, they would then discuss the applicant, and a decision would be made by Grant which employees to recommend for hire by Employer President and CEO Thomas Arjil. If there was a conflict as to whether to hire the applicant Grant and Montalbano would discuss their reasons for the decision and Grant would consider Montalbano's opinion before he made his decision.

On at least one occasion Montalbano disciplined an employee FTO for not properly performing her FTO duties. A written warning was issued. When the employee challenged the written warning, Grant told her the warning was rescinded since Montalbano did not have authority to give discipline.

Montalbano attended management meetings but was asked to leave them if personnel matters were discussed. Montalbano shared supervisor's offices with field supervisors but did not receive the additional pay that field supervisors receive.[5]

Section 2(11) of the National Labor Relations Act (Act) defines as supervisor as any individual:

> Having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment.

The enumerated indicia of supervisory status are read in the disjunctive and any one is sufficient to find an individual is a supervisor. *NLRB v. Chicago Metallic Corp*., 794 F. 2d 527 (9th Cir. 1986). In this case I must consider if Montalbano could effectively discipline employees, assign employees, recommend employees for hire or recommend FTO's and trainees not be retained.

The record reflects that Montalbano interviewed and rated employees and made a written notation on the interview sheet if they should or should not be hired. If he and Grant disagreed they conferred to resolve the difference and Grant took Montalbano's opinion into consideration. Grant then decided which employees to recommend for Arjil to hire. However, there is no evidence that Montalbano effectively recommended to Arjil any person for hire Grant did not want to recommend. Unlike the facts in *Queen Mary*, 317 NLRB 1303 (1995) cited by Petitioner, here there is no evidence that Montalbano's recommendation, independent of Grant, effectively caused the Employer to hire anyone. Nor is there any evidence that Montalbano effectively disciplined an employee or effectively recommended the appointment or removal of an employee as trainee or FTO. The facts reflect that Montalbano merely passed along

[4] FTOs earned 50 cents an hour more than other employees.

[5] Grant testified that Montalbano received additional supervisory pay. However, he was contradicted by Thomas Arjil (Arjil), the Employer's President and CEO. Only Arjil had access to records showing pay rates. I will credit Arjil's testimony.

evaluations for Grant's review and decision. Like the facts in *Harbor City Volunteer Ambulance Squad, Inc*., 318 NLRB 764 (1995) there is no evidence that the evaluations Montalbano passed on to Grant had any impact on the job status of FTOs or trainees. In the only incident involving employee discipline, Montalbano's warning to an employee for failing to perform FTO duties was immediately reversed and was told he had no authority to discipline.

The only indicium of supervisory status Montalbano may possess is the ability to assign FTO's to trainees in his capacity as Training Division Supervisor. The record reflects that Montalbano and Grant make out the FTO schedule. Assignment of FTOs and trainees was made on the basis of availability as shown on weekly assignment sheets made up by higher management. FTO's also volunteered for training assignments. While Montalbano kept track of the skills of both trainees and FTOs to determine who to pair up, it does not appear that Montalbano's assignment of FTO's required the use of independent judgment but was more in the nature of a routine assignment. *Arlington Electric, Inc.,* 332 NLRB 845 (2000); *KGTV*, 329 NLRB 454 (1999); *KGW-TV*, 329 NLRB 378 (1999); *The Ohio River Co*., 303 NLRB 696 (1991); *The Scranton Tribune*, 294 NLRB 692 (1989).

Based on the above factors, I find that Montalbano is not a supervisor within the meaning of Section 2(11) of the Act and I recommend that the challenge to his ballot should be overruled and his ballot should be opened and counted.

3. The Objections

The Employer filed two objections which state:

1. The Petitioner and/or the Intervenor, through their representatives, agents, members and adherents, interfered with employees' ability to exercise free and reasoned choice in the election and destroyed the requisite laboratory conditions by engaging in campaign activity within close proximity of the polls during the hours of the election.

2. By the above and other conduct, the Petitioner and/or the Intervenor interfered with, coerced and restrained employees in the exercise of their Section 7 rights, interfered with employees' ability to exercise a free and reasoned choice in the election, and destroyed the requisite laboratory conditions.

In the Report on Objections and Challenged Ballots and Notice of Hearing, the Regional Director recommended that the Board overrule Employer's Objection 2 on the ground that it is insufficiently specific.

Petitioner filed six objections. Prior to the hearing, by letter dated November 24, Petitioner withdrew all six objections. By letter of November 29, the Assistant to the Regional Director referred the request to the Administrative Law Judge. At the hearing Petitioner renewed it request to withdraw its objections. There was no objection from the Employer and I granted Petitioner's request to withdraw all of its objections.

Intervenor filed 13 objections. In an October 27 request, Intervenor asked to withdraw its Objections 2-5, 7, 8, and 10-13. The Regional Director approved Intervenor's request in the Report on Objections and Challenged Ballots and Notice of Hearing. The only evidence adduced at the hearing was in support of Intervenor's Objection 9. I will recommend that the Board overrule Intervenor's Objections 1 and 6. Intervenor's Objection 9 states:

The Employer, by its agents and Petitioner, NEMSA, by its agents, prevented a fair election by engaging in improper and unlawful campaigning.

Employer's Objection 1

The Petitioner and/or the Intervenor, through their representatives, agents, members and adherents, interfered with employees' ability to exercise free and reasoned choice in the election and destroyed the requisite laboratory conditions by engaging in campaign activity within close proximity of the polls during the hours of the election.

The election was conducted at the Employer's operations center located at 8611 Folsom Boulevard, Sacramento, California. The operations center consists of a human resources office, dispatch center, training room, supervisor's office and an employee lounge located on the second floor of a two story office building. Balconies run the width of the second floor on the front and back of the second story.[6] The polling area was located in the training room on the far right side of the operations center. Access to the polling area was via the front door, through the employee lounge, out the back balcony, and through the supervisor's office. From the employee lounge a voter had to walk about 40 feet to the polling place.

On August 26, Susie Shields (Shields), a specialty care transportation nurse, arrived at the Employer's operations center at about 9:00 a.m. to vote. When she arrived at the operations center, Shields saw a large SUV with NEMSA identification on the vehicle parked in the lot in front of the operations center. When Shields entered the employee lounge she saw five people standing at the rear of the lounge near the exit to the balcony.[7] The five were identified as Ann Miles (Miles), a former employee, Curtis Craiglow (Craiglow), a former employee, Forest Wenzel (Wenzel), an Employer paramedic, Melanie Collins (Collins), an Employer paramedic or EMT and Jamie Weeks (Weeks), an employee of American Medical Response. Collins, Weeks and Wenzel were wearing NEMSA t-shirts and Wenzel was also wearing a NEMSA baseball hat. Before 9:00 a.m. Shields passed within three feet of the group of five people on her way to vote. It was about 40 feet from where the group was standing to the polling entrance. As Shields passed the group, Wenzel told her to "go in there, vote NEMSA, vote for us."[8] While Shields saw other employees pass by this group, she could not hear what members of the group said to the other employees.

John Montalbano (Montalbano), the Employer's training supervisor and paramedic, arrived to vote on August 26 at about 9:00 a.m. During the polling period, Montalbano heard Weeks tell an unidentified voter on the rear balcony at the exit from the employee lounge that "AMR (American Medical Response) is voting for the union, this is the union, why don't you guys be like us." Also during the polling period Montalbano heard Collins tell Charlyn Avelar (Avelar), an Employer specialty care transportation nurse, on the rear balcony near the entrance to the supervisor's office, "the vote that you are going to cast for NEMSA is hurting all of us. Or don't vote for the union, something with the union and the vote is going to hurt all of us." On cross examination Montalbano clarified that Collins said "vote for the union, because if not you are hurting all of us."

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[6] See Employer's exhibit 1.

[7] Employer's exhibit 1 at the handwritten #1.

[8] On the morning of the election, Wenzel testified that he could not recall speaking about the Union to any one other than Weeks and John Montalbano. Because her recollection was specific and without inconsistency, I credit Shield's testimony.

The Employer contends that Weeks is an agent of NEMSA and his statements should be considered under the *Milchem*[9] standard that deals with parties to an election. In the alternative Weeks' and other employees' statements should be reviewed under the standard in *Hollingsworth Management Services*, 342 NLRB No. 50 (2004). In either case, the Employer argues that the conduct of Weeks, Collins and Wenzel justify setting the election aside.

The record reflects that Weeks was not employed by the Employer. The Employer erroneously argues that NEMSA granted Weeks apparent authority to speak on its behalf by giving him "the keys" to its SUV that was parked in front of the Employer's operations center on the day of the election. While the SUV with NEMSA logo was parked in front of the Employer's operations center the morning of the election, the evidence establishes that NEMSA observer Jessica Sullivan drove the NEMSA SUV to the Employer's operations center the morning of the election. There is no other evidence that would have reasonably led employees to conclude that Weeks was authorized to speak on behalf of NEMSA. His mere presence and the fact that he was wearing clothing with NEMSA insignia is insufficient to lead a reasonable person to conclude Weeks was authorized to speak on NEMSA's behalf. I find that Weeks is neither an actual nor apparent agent of NEMSA. Accordingly, the employee conduct must be judged under the *Holllingsworth* standard.

In *Hollingsworth, supra*, the Board stated that in evaluating electioneering by non-parties the standard is, "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside. *Rheem Mfg. Co.,* 309 NLRB 459, 463 (1992); *Southeastern Mills*, 227 NLRB 57, 58 (1976)."[10] In *Hollingsworth*, there was evidence of significant and prolonged electioneering *by* pro-union employees. The electioneering took place over a significant period of time and was done in the presence of a large number of employees waiting in line to vote near the polling place. There were also at least two incidents of "manhandling" of employees in line to vote by the pro-union employees. The Board found that this conduct was neither brief nor isolated and the remarks made by the pro-union employees were not mere remarks made in passing. The Board was particularly troubled by the electioneering and manhandling done in the presence of a captive audience of employees in line to vote.

I find *Hollingsworth* distinguishable from the facts of this case. Here, the comments made by Collins, Weeks and Wenzel appear to have been isolated. They were brief comments made in passing and were not made to a captive audience waiting to vote. Contrary to the Employer's assertion, there is no evidence, other than the comments mentioned above that Collins, Weeks or Wenzel engaged in any other electioneering before or during the time the polling place was open. There was no evidence of intimidation or coercion as in *Hollingsworth*. The mere wearing of union insignia on employee clothing is not enough to set an election aside. *Colfor, Inc*., 243 NLRB 465 (1979).

I find that the comments of Collins, Weeks and Wenzel did not substantially impair the employees' exercise of free choice and I recommend that Employer Objection 1 be overruled. Cf. *Angelica Healthcare Services Group, Inc.*, 280 NLRB 864 (1986).

[9] *Milchem, Inc*., 170 NLRB 362 (1968).

[10] *Hollingsworth Management Services,* 342 NLRB No. 50, at 3 (2004)

Intervenor's Objection 9

The Employer, by its agents and Petitioner, NEMSA, by its agents, prevented a fair election by engaging in improper and unlawful campaigning.

Montalbano testified that after he voted around 9:00 a.m. he sat in the supervisor's office, adjacent to the polling place, to work. After a short period of time, the Board agent told Montalbano to leave the supervisor's office. During the brief time he sat in the supervisor's office, no employees came into the polling place to vote.

The Board will set aside an election where the conduct reasonably tended to interfere with employee free choice.[11] The Board set aside an election in *Performance Measurements Co.,* 148 NLRB 1657 (1964), where each voter had to pass within two feet of the company president in order to get to the polling place. To the contrary, the mere presence of supervisors in the vicinity of the polling area who did not engage in electioneering or speak to voters did not warrant setting elections aside. *Components, Inc.,* 197 NLRB 163 (1972); *Serv-Air, Inc*., 183 NLRB 263 (1970).

In this case, Montalbano, who I have found is not a supervisor, was in the vicinity of the polling place for only a brief time. No employees passed Montalbano on the way to vote and there is no evidence Montalbano spoke to any employee while he was in the supervisor's office. Under these circumstances, I find there was no interference with employee free choice and I recommend that Intervenor's Objection 9 be overruled.

Conclusion

In the manner described fully above, I recommend that the ballots be opened and counted and the Employer's and Intervenor's Objections be overruled.[12]

Dated: San Francisco, California, this 16th day of February 2005.

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John J. McCarrick
Administrative Law Judge

[11] See *Milchem, supra*.

[12] Any party may, under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, file exceptions to this report with the Board in Washington, D.C., within fourteen (14) days from the issuance of this report and recommendations. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. Exceptions must be received by the Board in Washington, D.C. by March 2 , 2005. If no party files exceptions thereto, the Board may adopt the recommendations set forth herein.